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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1956.

No. 294

CLYDE EUGENE GARNER, AUDREY HART GARNER,
HORACE G. TWITTY, OREN CLOUD FESMIRE,
SAMMY JOE GARNER, EDD JOHN MAYO,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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To the United States Court of Appeals for the Sixth Circuit.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Clyde Eugene Garner, Audrey Hart Garner, Horace G. Twitty, Oren Cloud Fesmire, Sammy Joe Garner and Edd John Mayo, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on May 13, 1957. The Opinion of the Court of Appeals in this case filed the same day is in the Appendix hereto.

STATEMENT OF JURISDICTION.

The order of the Court of Appeals affirming the judgment of the United States Court for the Western District of Tennessee was entered May 13, 1957. May 30, 1957, the Court of Appeals entered an order allowing the petitioners an additional thirty days to file their petition for a rehearing. Said petition was filed June 17, 1957, and on June 25, 1957, the Court of Appeals entered an order denying the same. This petition, accompanied by a certified transcript of the record, as required by Rule 21 of this Court, is filed with the Clerk within 30 days after entry of the order denying the petition to rehear. The jurisdiction of this Court is invoked under Title 28, U. S. C., Sec. 1254 (1), Rules 19, 21, 22 and 23 of this Court, and Rule 37 (c) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED FOR REVIEW.

(1) Whether the petitioners have suffered substantial prejudice from being convicted of a single general conspiracy by evidence which proved not one conspiracy but eight different ones. The evidence showed not only unrelated conspiracies but also isolated acts of criminality or of suspicious character utterly unconnected with the main conspiracy charged. In their execution there was not even a "common key figure."

(2) Whether there was substantial evidence that the petitioners were guilty of the conspiracy alleged in the indictment? Petitioners contend that the evidence did not establish the essence of the offense, to-wit, the unlawful conspiracy, and the only tendency of the proof was to determine the guilt or innocence of the petitioners with respect to a substantial violation, actual or claimed, of the Internal Revenue Laws.

(3) Whether the district Court committed reversible error when in permitting the jury to take the indictment to the jury room with them during the deliberations he did not instruct them as requested by petitioners as follows:

> "The Court is permitting you to take to the jury room with you the indictment in this case, but you are again instructed that the indictment itself is not evidence of the guilt of the accused person."

The substance of the requested instruction was not covered in the general charge to the jury.

STATEMENT OF THE CASE

The record consists of two printed volumes, comprising the appendices to the briefs in the Court of Appeals. The Petitioners' Appendix consists of one volume and is numbered 1a through 137a, and Respondent's Appendix is in one volume numbered 1b through 95b.

On March 26, 1956, a one count indictment was returned in the United States District Court for the Western District of Tennessee, Eastern Division, against Clyde Eugene Garner, his wife, Audrey Hart Garner, Horace G. Twitty, Oren Cloud Fesmire, Sammy Joe Garner, Edd John Mayo, Hood Luther, Henry Laverne Nix, and James George Reves, charging them with engaging in a conspiracy under Title 18, Section 371, U. S. Code Annotated, with respect to the unlawful manufacture, transportation, distillation, possession, et cetera, of intoxicating liquors, in violation of Sections 2803, 5008 (b), 2913, 5632, 2810, 5174, 2833, 5606, 2834, 5216 (a) and 7302, of the Internal Revenue Code of 1939, Title 26, U. S. Code. The indictment alleged the conspiracy began on or about September 1, 1954 and continued up to and including the date of the indictment, to-wit, March 26, 1956 (App. 3a).

The defendants Luther, Nix and Reves, on their pleas of guilty, were sentenced prior to the trial. The trial of the Petitioners began May 30, 1956, and ended on June 1, 1956, with a verdict of guilty as to all six of them. Sentences were as follows: Clyde Eugene Garner three and one-half years imprisonment and a $10,000 fine; Audrey Hart Garner eighteen months imprisonment and a $5,000 fine; Sammy Joe Garner and Oren Cloud Fesmire eighteen months imprisonment each; Horace G. Twitty three and one-half years in prison and Edd John Mayo one year imprisonment (App. 2a).

The Government endeavored to hold all the Petitioners responsible for violations of the Internal Revenue Laws

as to whiskey taking place at four or five distilling sites in three distinct Counties of Tennessee, to-wit, Henderson, Chester and Decatur, and for substantive, but isolated, other offenses and transactions in those three and other Counties in the Western District of Tennessee. No relationship of these ventures to the others was proved. There was no substantial evidence that all of them were part of any general conspiracy.

Petitioners Clyde Garner and Audrey Garner, husband and wife, live on a farm in the "Garnertown" section of Henderson County. On September 8, 1954, Treasury Agents found 63½ gallons of untaxed whiskey 150 yards "back of the Garner residence" (App. 29a). On the same day the officers discovered a partially dismantled still one mile away from the Garner residence on property whose ownership was not proved (App. 48a). In the course of this visit of the agents the Petitioners Horace Twitty and Sammy Joe Garner entered Clyde Garner's yard in a truck which contained a ton of sugar. Sammy Joe Garner had on his person a note signed "Audrey," apparently addressed to some merchant about a sugar purchase (App. 46b). A short while later Petitioners Fesmire and Mayo, respectively, drove an automobile and a truck into the same yard (App. 49b). They found no distillery on property of the defendants Clyde and Audrey Garner, and there was nothing to show that Clyde and Audrey Garner, Sammy Joe Garner, Twitty, Mayo or Fesmire had any connection with the partially dismantled distillery one mile away from the Garner home. The other three defendants named in the indictment, Hood Luther, Henry Nix and James George Reves, were never seen anywhere in Henderson County on any occasion. The court denied the Petitioners' motion to exclude this evidence (App. 130a).

The next transaction involved a delivery of 2,000 pounds of sugar October 12, 1954, by Webb's Grocery of Lexington, Henderson County, Tennessee, to Sammy Joe Garner

and payment therefor by Andrey Garner. Petitioners Twitty and Clyde Garner also received sugar from this store in the fall of 1954 (App. 63a, 64a). There is no proof of still operations involving any of the Petitioners in October, November, or December of 1954.

The jury was permitted to consider the operation of a distillery at Brodie's Landing in Decatur County, Tennessee, many miles from Garnertown, without any evidence whatever that any of the Petitioners had any connection therewith. Overt Act No. 6 alleged in the indictment that "on or about January 20, 1955 on TVA land in Decautur County, Tennessee, co-conspirator Clyde Eugene Garner set up and operated two 2400 gallon still pots . . ." (App. 8a). State Highway Patrolman Blassingame testified that in the latter part of January, 1955, when he casually met Clyde Garner at a point in Chester County, the latter, out of the presence of the other Petitioners and defendants, remarked, jokingly or otherwise, that he had had hard luck in locating two large stills on land he mistakenly understood belonged "to someone else", whereas it developed it was Tennessee Valley Authority land. Blasingame said he **believed** the distillery referred to by Clyde Garner "was supposed to be in Decatur County" (App. 76a, 77a). There was no proof of any distillery on TVA land at any time in January of 1955. Garner made no reference to the identity of other persons, if any, who were interested in said still. The witness could not say Garner referred to any particular point in the vast acreage owned by the Tennessee Valley Authority in that county. The name Brodie's Landing was not mentioned in the conversation. Certainly, these weird utterances of that Petitioner to a uniformed law enforcement officer were not in furtherance of any conspiracy but rather were in its defeat. **Fiswick v. U. S., 329 U. S. 211; Krulewitch v. U. S., 336 U. S. 440.** There is not even any corpus delicti of still operations in Decatur County in January of 1955.

No basis existed for the court's permitting the jury to consider this uncorroborated remark of Clyde Garner against all the absentee petitioners and defendants, none of whom, including Clyde Garner, was shown to have ever been in the vicinity of the TVA reservation in Decatur County. It was nearly four months later, on May 4, 1955, that Officer Lumpkins found two large stills in the section known as **Brodie's landing** on TVA property (App. 41a). The discovery of this distillery is too remote to relate to the remarks of petitioner Clyde Garner in January, and it was error for the trial court to deny the Petitioners request to instruct the jury to disregard the evidence concerning distilleries on TVA land (App. 132a). The jury should not have been permitted to assume that because some of the Petitioners once before might have been involved with Clyde Garner, in the fall of 1954 in any county, that Garner if concerned in any Decatur County distillery in either January or May of 1955 had the assistance or cooperation of any or all of the Petitioners and the other three defendants.

Overt Act No. 7 (App. 8a) charged that on March 15, 1955, the petitioner Fesmire "at his home in Henderson County, Tennessee, possessed 90 gallons of non-taxpaid whiskey." This matter had no rightful place in the prosecution. On that date Revenue Agent White found a distillery in Henderson County "located some quarter of a mile behind the Fesmire house", and after destroying the same found in an outbuilding 20 or 30 feet from Fesmire's house 90 gallons of moonshine whiskey. Some time before the trial Fesmire pleaded guilty to a separate indictment for this possession and was sentenced to imprisonment by the court (App. 70a, 71a, 60b, 92a, 93a). There is nothing to show that this distillery was on the land of Clyde and Mrs. Garner, and no basis existed for holding them and the other Petitioners and defendants responsible for Fesmire's possession of the whiskey. A landlord is

not necessarily responsible for the criminal acts of his tenants. Yet this transaction was allowed to be considered by the jury as an overt act with full authority on their part to use it against all of the Petitioners. During the trial Fesmire testified without contradiction that he, alone, was the owner of this liquor (App. 93a). Again the court erred in refusing to exclude this testimony from the consideration of the jury (131a).

Evidence of another transaction unrelated to any conspiracy or to any of the Petitioners, except Clyde Garner, was detailed by the witness Roy Bailey, a Chester County farmer. He said that in the fall of 1954 Clyde Garner requested permission to put a still on his land which permission was refused; that thirty days later he found three distilleries thereon, and then informed Clyde Garner that if the equipment was his he wanted it moved; that Garner, *mirabile dictu*, advised Bailey to report the stills to the sheriff of Chester County, which the witness did. The Bailey land is 20 miles from the Garner home (App. 80a-83a). No other proof was given about this transaction. The sheriff in question did not testify. This tenuous evidence should have been excluded, because even if it were sufficient to implicate Clyde Garner with the stills there was no basis for inferring that the other Petitioners, and the three defendants who were not on trial, were in conspiracy with Garner. The jury, over the objection of Petitioners' counsel, was permitted to consider it without any limitations whatever against all the parties on trial (App. 131a).

The court instructed the jury that the conspiracy alleged was to violate certain Internal Revenue statutes "in the Counties of Chester, Decatur, and the Garnertown section" (App. 87b). Yet he permitted the jury to consider evidence of the seizure of 30 gallons of illegal whiskey in the home of one John Warren in **Gibson County**, 30 to 35 miles from Garnertown. On April 14,

1955, near Warren's home, Captain Robinson, State Highway Patrol, saw petitioner Twitty and Warren in the latter's automobile, and found in Twitty's car nearby "container prints" and "a wet spot which could have been made by whiskey." The 30 gallon seizure was then made in Warren's home. If these acts showed a conspiracy to possess tax-unpaid whiskey, the conspiracy was limited to Warren and Twitty. There was no evidence of any connection between Warren and the other Petitioners, or that the other Petitioners, and the three defendants not standing trial, even knew Warren. The source of supply of the 30 gallons is still a mystery. A motion to exclude this evidence was overruled (App. 131a).

Proof was given the jury of a distilling venture at Bath Springs, Decatur County, terminating August 13, 1955. The operators Hood Luther, Henry Laverne Nix and James George Reves, who pleaded guilty and did not stand trial, apparently during the time this enterprise was in effect, never left the distillery site which was on the Tennessee River (App. 89a). There was no evidence to connect with that operation, directly or indirectly, the Petitioners Mayo, Mrs. Audrey Garner, Sammie Joe Garner or Fesmire, the latter at that time being confined in a Federal penal institution serving his sentence for the possession of the 90 gallons of whiskey for which he was arrested about March 15, 1955. Mr. and Mrs. Adkins, whose home was near the Bath Springs distillery, testified about conversations and activities of the Petitioners Clyde Garner and Twitty, and Nix, Luther and Reves, at the Adkins home and in the vicinity of the distillery several weeks prior to April 13, 1955. In these conversations not even the names of the absentee Petitioners, to-wit, Mrs. Garner, Fesmire, Mayo and Sammy Garner, were mentioned (App. 5b et seq., 32b et seq.), but these parties were made to answer for what occurred or what was said at Bath Springs according to the court's instructions.

It is obvious the prosecuting attorneys appreciated the lack of interest of the four Petitioners mentioned above in the latter distillery operation. Note that overt act No. 9 in the indictment states that on August 13, 1955, and for several weeks before "co-conspirators Hood Luther, Horace G. Twitty, Clyde Garner, Henry Laverne Nix and James George Reves operated" these Bath Springs stills, etc. (App. 8a). The court erred in not granting Petitioners' motion to instruct the jury to disregard the Bath Springs evidence (App. 130a).

Other evidence was admitted of isolated law violations and extraneous conduct unrelated to the main conspiracy charged, but we believe we have said enough to emphasize the confusion and beclouding of the issues to be found in this "mass prosecution."

At the conclusion of all the proof the court denied the Petitioners' motion for a judgment of acquittal on grounds that no substantial competent evidence had been introduced showing the existence of the conspiracy described in the indictment; that there was no substantial evidence supporting the guilt of the offense charged on the part of the Petitioners, Mr. and Mrs. Garner, Fesmire, Sammy Joe Garner, Edd John Mayo, and Horace Twitty and that the proof introduced did not show guilt of the conspiracy on the part of any of the Petitioners herein (App. 133a, 134a).

THE COURT'S CHARGE TO THE JURY.

Despite trial counsel's motions presenting the question of fatal variance and their endeavors by motions to protect individual Petitioners from the dangers of **"transference of guilt" (Kotteakos v. U. S., 328 U. S. 750)**, resulting from the proof of isolated unlawful transactions involving a minority of the nine named conspirators, and in several instances only one of the named conspirators, the court in his instructions to the jury made inevitable this unjust

"transference of guilt." In the final charge he treated all of these enterprises, distinctive in time, place and personnel, as constituting one conspiracy, time and again using such expressions as "the conspiracy charged in the indictment," and "a conspiracy," and "the conspiracy." And his instructions regarding joint responsibility of conspirators for acts and declarations of the others were based on the premise of one conspiracy charged and but one established. He thus made each defendant responsible for the acts and declarations made by the parties to the separate conspiracies and those of them who might have committed individual offenses, regardless of the absentee Petitioners' connection therewith, their knowledge thereof, or their acquaintance with the participant therein (App. 79b, 84b, 85b, 86b, 87b).

After the court gave the jurors the indictment to take with them to the jury room to consider during their deliberations, he refused to grant Petitioners' request for Special Instructions No. 2, as follows:

> "The court is permitting you to take to the jury room with you the indictment in this case, but you are again instructed that the indictment itself is not evidence of the guilt of the accused persons" (App. 135a).

Nowhere in the instructions to the jury did the court inform them that the indictment itself was not evidence of the guilt of the accused.

REASONS WHY THE WRIT SHOULD BE GRANTED.

I.

The Court of Appeals has decided questions of Federal law in a manner in conflict with applicable decisions of this Court. The jury was allowed to convict the six Petitioners of conspiracy on evidence of not only one conspiracy but of eight different conspiracies and some spe-

cific violations not shown to be a part of any conspiracy. Thus the action of the Court of Appeals was contrary to the principles established by this Honorable Court in **Kotteakos v. U. S., 328 U. S. 750; Berger v. U. S., 295 U. S. 78;** and **Blumenthal v. U. S., 332 U. S. 539.** The Court of Appeals also upheld the conviction of some of the Petitioners who, as we will hereinafter show, at the most only participated in an overt act or substantive offense not shown to have any knowledge of or the required "stake in the outcome" of any conspiracy, contrary to the rulings of this Court in **Di Re v. U. S., 332 U. S. 581,** and **Falcone v. U. S., 311 U. S. 205.**

Of great prejudice to these Petitioners was the variance between the single conspiracy charged in the indictment, and also assumed as single by the trial court, and the government's proof tending to show not only additional and unrelated conspiracies but isolated acts of criminality or of suspicious character on the part of individual Petitioners and defendants utterly unrelated to the conspiracy charged. Considering the rule making conspirators responsible for the actions and declarations of co-conspirators out of their presence and hearing, even without the knowledge of the absentee conspirators, and the broad instructions of the court to the lay jurors, it is easy to understand the prejudice and dangers naturally resulting from this mass prosecution involving multiple conspiracies and isolated crimes on the part of some of those named in the indictment. Such character of prosecution often results in the conviction of a defendant of the crime charged on proof of another and different offense, which procedure is in violation of the due process provision of our Constitution. **Cole v. Arkansas, 333 U. S. 196; Stewart v. Michigan, 230 U. S. 665; Vann v. U. S. (5th Cir.), 76 Fed. 2d 608.**

This prosecution was so conducted that the Petitioners, who had the right to be informed of the nature and

character of the accusation against them, were unable to present their defenses and were victims of "**transference of guilt**" from one party or parties, over whom they had no control, to themselves. The prejudice resulting from the evidence of these multiple conspiracies and offenses, in some instances, involving only one defendant acting singly and, we say independently in this case, reaches that degree compelling the granting of a new trial under the principles of **Kotteakos v. U. S.**, supra, and **Berger v. U. S.**, supra.

The false assumption throughout this trial that if some three or four persons should act in concert in violating Internal Revenue Laws at some site, say in the month of September, the entire group named in the indictment would individually be responsible for all other distillery and whiskey operations at other times and places if one or more of the first group were involved alone or with strangers therein, even though those not participating in subsequent operations had no knowledge of or the required "stake in the outcome" of the latter ventures.

To uphold these convictions in the face of this prejudicial variance would be to ignore the principles enunciated in **Kotteakos v. U. S.**, supra; **Berger v. U. S.**, supra, and **Blumenthal v. U. S.**, supra. In the **Kotteakos** case, Judge Rutledge declared that the petitioners suffered substantial prejudice from their being convicted of a single conspiracy on evidence proving not one but eight or more different ones of the same sort executed through a "**common key figure.**" Here we do not have a "common key figure." At the trial (App. 121a), and in the Respondent's brief in the Court of Appeals, the petitioners Mr. and Mrs. Clyde Garner were charged as "superiors" of the alleged conspiracy. Yet, Mrs. Garner was not shown to have any guilty connection, by direct or circumstantial evidence, with the enterprises, and Clyde Garner was not involved in a number of them. The most that

can be said against Mrs. Garner is that she is lawfully wedded to a named conspirator. Association by blood or marriage has never been accepted as warranting an inference of guilt. **Henderson v. U. S. (6th Cir.), 202 Fed. 2d 400; Templeton v. U. S., 151 Fed. 2d 706; Lee v. State, 66 Ark. 286.** Also, it has long been held in many courts that a husband and wife alone cannot form an unlawful conspiracy.

In the **Kotteakos** case, numerous defendants made false statements for F. H. A. loans independently of each other **but all through the key defendant Brown,** and there was no question that each conspired with Brown. This Court gave full consideration to the prior decision of **Berger v. U. S., 295 U. S. 78,** wherein one conspiracy had been charged but two proved against three defendants, one of which had two participants, the other had three, and the defendant Katz was common to each. There, it was held that the variance was not such as to affect the substantial rights of the accused due to the unusual circumstances of the case and the precautions taken by the trial judge. In the **Kotteakos** case Justice Rutledge made the following remarks about how the defendants therein were prejudiced by the proof of the multiple and unrelated conspiracies, which we believe are applicable to the full extent in this case:

> "Obviously the burden of defense to a defendant, connected with one or a few of so many distinct transactions, is vastly different not only in preparation for trial, but also in looking out for and securing safeguard against evidence affecting other defendants, to prevent its transference as 'harmless error' or by psychological effect, in spite of instructions for keeping separate transactions separate." 328 U. S. 767.

The trial judge in that case, as did the one in the instant cause, in his instructions treated the evidence as presenting one conspiracy. This Court said:

"Moreover, the effect of the court's misconception extended also to the proof of overt acts. Carrying forward his premise that the jury could find one conspiracy on the evidence, the trial judge further charged that, if the jury found a conspiracy, 'then the acts or the statements of **any** of those whom you so find to be conspirators between the two dates * * * may be considered by you in evidence as against **all** of the defendants whom you so find to be members of **the** conspiracy' (p. 770).

"On those instructions it was competent not only for the jury to find that all of the defendants were parties to a single common plan, design and scheme, where none was shown by the proof, **but also for them to impute to each defendant the acts and statements of the others without reference to whether they related to one of the schemes proven or another, and to find an overt act affecting all in conduct which admittedly could only have affected some**" (p. 771). (Emphasis supplied.)

"**Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application.** * * * When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group" (p. 773). (Emphasis supplied.)

"But if the practice here followed were to stand, we see nothing to prevent its extension to a dozen, a score, or more conspiracies and at the same time to scores of men involved, if at all, only separately in them. **The dangers for transference of guilt from one to another across the line separating conspiracies,**

subconsciously or otherwise, are so great that no one really can say prejudice to substantial right has not taken place. Section 269 had no purpose to go so far. The line must be drawn somewhere. **Whether or not Berger marks the limit, for this sort of error and case, we are clear that it must lie somewhere between that case and this one"** (p. 774). (Emphasis supplied.)

" . . . we disagree with that conclusion and with the ruling that the permeating error did not affect 'the substantial rights of the parties.' That right, in each instance, was the right not to be tried en masse for the conglomeration of distinct and separate offenses committed by others as shown by this record" (p. 775).

It was said in **Berger v. U. S., 295 U. S. 78, 82:**

"The general rule that allegations and proof must correspond is based upon the obvious requirements (1) that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial. * * *"

The Court of Appeals in the same **Berger** case, **73 Fed. 2d 278, 280,** referring to the joinder of conspiracies in the proof, said that a question to be considered is:

"How far it throws confusion into the trial and makes it liable to miscarry."

The Government conceded in another case that, if more than one conspiracy is proved on a trial, prejudice results and the question then is as to its degree. **Blumenthal v. U. S., 332 U. S. 539.**

In line with our contentions is **U. S. v. Peoni, 100 Fed. 2d 401 (2nd Cir.),** as follows:

"At times it seemed to be supposed that, once some kind of criminal concert is established, all par-

ties are liable for everything any one of the original participants does, and even for what those do who join later. **Nothing could be more untrue. Nobody is liable in conspiracy except for the fair import of the concerted purposes or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purposes while he remains in it.**" (Emphasis supplied.)

It seems that the main reason for bringing Mrs. Audrey Garner into the conspiracy is that she is Clyde Garner's wife and had the bank account in her name. Her signing a court appearance bond for Fesmire warrants no inference of guilt (App. 62b). There is nothing unnatural in a landlord, particularly in the South, "bailing out" his tenants. Eliminate the circumstance of Mrs. Garner's giving her check to pay for a large quantity of sugar one or two times and any suspicion of her being connected with a conspiracy vanishes. There is no evidence as to the particular destination of the sugar paid for by her or charged to her in the two stores. Even if she knew that the sugar paid for by her would be probably used in the manufacture of illegal whiskey, under the principles of **Falcone v. U. S., 311 U. S. 205,** she would not be a conspirator just on that showing.

There is no substantial evidence that Petitioner Fesmire was involved in the main conspiracy, or any other conspiracy. He is not shown to have acted jointly with anyone. Whatever his landlords, Mr. and Mrs. Garner, may have done is not chargeable to him. The proof is that at one time he possessed 90 gallons of illicit whiskey and a 40-pound sack of charcoal. This discovery resulted in his arrest and prior sentence. It is stretching things too far to infer, first, that those things were done as a part of a conspiracy, and, second, that the conspirators were the six Petitioners and the other defendants.

All that is shown against Mayo and Sammy Joe Garner is that on an occasion or two they either had in their possession a large quantity of sugar or were in the presence of someone else in possession of such materials. Such facts are insufficient to join one in a conspiracy. See, **Falcone v. U. S.**, supra; **Di Re v. U. S., 332 U. S. 581; Bell v. U. S., 2 Fed. 2d 543; Lewis v. U. S., 219 Fed. 36.** As said in **Linde v. U. S., 13 Fed. 2d 261:**

> "The evidence must convince that the defendants did something other than participate in a substantive offense which was the object of the conspiracy."

Recently, Your Honors announced to prosecuting attorneys that too much reliance must not be put upon the assumed magic resulting from the charge of conspiracy. **Grunewald v. U. S., 353 U. S. 931, 1 L. Ed. 2nd,** decided May 27, 1957:

> "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions. The important considerations of policy behind such warnings need not be again detailed."

The Court of Appeals disposed of the foregoing questions in the following paragraph of its Per Curiam Opinion:

> "Numerous other questions are presented by appellants' brief dealing with the admissibility of evidence and motions for a mistrial, which we have considered. The evidence on behalf of the Government was strong and convincing. In our opinion, the rulings complained of did not constitute prejudicial error. Rule 52 (a), Rules of Criminal Procedure."

II.

By its failure to declare erroneous and prejudicial the refusal of the trial court to grant Petitioners' special request No. 2 for instruction that "the indictment itself is not evidence of the guilt of the accused persons," which indictment the jurors took with them to the jury room, the Court of Appeals for the Sixth Circuit has rendered a decision in conflict with a decision of another Court of Appeals on the same matter, and has decided an important question of Federal law which has not been decided, and should be decided by this Court.

This indictment contained the details of some ten overt acts, many involving but one person, and none alleged to have been committed by all defendants (App. 3a). Some were supported by no proof, which was a compelling reason for the granting of this requested instruction.

In the Per Curiam Opinion, it is stated that "the requested instruction embodied a correct principle of criminal law, **and might well have been given.**" What reason, then, was there for not giving the appellants the benefit of this added precaution? It is conceded that when the indictment is taken to the jury room the refusal to instruct the jury as requested by the appellants is reversible error unless the subject is otherwise sufficiently covered in the instructions given. Telling the jury, as the trial judge did, that the indictment "is the means by which the defendants are brought to trial before this court," etc., that the indictment "charges the defendants," that a conspiracy is "charged against them in the indictment," and that there must be proof beyond a reasonable doubt "after a careful consideration of the evidence in this case," that the defendants participated in the conspiracy "charged against them by the Government," is not equivalent to saying that the indictment itself is not evidence of guilt of the accused persons. As was said by Judge Cardozo in **Shepard v. U. S., 290 U. S. 96, 104:**

"It is for ordinary minds, and not for psycho-analysts, that our rules of evidence are framed."

Since, as stated in **Bollenbach v. U. S., 326 U. S. 607**, it cannot be said that "the lay jury will know enough to disregard the judge's bad law if he in fact misguides them", it is likewise illogical to assume the twelve men are of sufficient intellect to replace the omissions of the court's instructions.

In **Schanerman v. U. S., 150 Fed. 2d 941, 944 (10th Cir.)**, the judge, whose refusal to grant a request similar to that of the Petitioners was determined to be reversible error, gave the jurors every precaution that the district judge herein furnished the instant jury. The **Schanerman** judge told the jury that "a defendant in a court room in America is presumed to be innocent until he is found guilty by a jury beyond a reasonable doubt", and "that this presumption is with him at the beginning and all throughout the trial until the jury shall have decided beyond a reasonable doubt that **he is guilty as charged.**" He also told the jurors, "You cannot find the defendant guilty **unless from all the evidence you believe him guilty beyond a reasonable doubt.**" He further said to the jury, "The indictment may go to their room so they can read it and **familiarize themselves with the charge.**"

Observe the strong language of the judge in **Capriola v. U. S., 61 Fed. 2d 5, 8**, who, in sending the indictment to the jury, said:

"The presentation of this indictment is no evidence of their guilt. It is not to be treated by you in any way as raising any kind of presumption or creating any kind of prejudice against the defendants. The indictment is a formal, written accusation of pleading by which the defendants are brought to trial. You must regard this indictment in that light and in no other light."

In view of the unusual circumstances in this case, we feel the rulings complained of constituted prejudicial error.

PRAYER.

Wherefore, your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the Court of Appeals for the Sixth Judicial Circuit, commanding that court to certify and send to this Court for its review and determination on the day certain to be therein named, a full and complete transcript of the record and proceedings in the case on its docket entitled, Clyde Eugene Garner, Audrey Hart Garner, Horace G. Twitty, Oren Cloud Fesmire, Sammy Joe Garner, Edd John Mayo, Appellants, v. United States of America, Appellee, No. 13,006, to the end that said case may be reviewed and determined by this Court as provided by 28 U. S. C., Sec. 1254 (1), and the applicable Rules promulgated by this Court, governing applications for certiorari in criminal cases, and that the judgment of the Court of Appeals be reversed by this Honorable Court, and that Petitioners may have such other and further relief in the premises as to this Honorable Court may seem right and proper.

Respectfully submitted,

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APPENDIX.

PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Cause Argued and Submitted.

April 4, 1957—Before: Simons, Chief Judge; Allen and Miller, Circuit Judges.

This cause is argued by Carmack Murchison for appellants and by Warner Hodges for appellee and is submitted to the court.

Judgment.

(Filed May 13, 1957.)

Appeal from the United States District Court for the Western District of Tennessee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Tennessee, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be and the same are hereby affirmed.

Opinion.

(Filed May 13, 1957.)

No. 13,006.

United States Court of Appeals
For the Sixth Circuit.

Clyde Eugene Garner, Audrey Hart Garner, Horace G. Twitty, Oren Cloud Fesmire, Sammy Joe Garner, Edd John Mayo, Appellant, v. United States of America, Appellee.	Appeal from the United States District Court for the Western District of Tennessee, Eastern Division.

Decided May 13, 1957.

Before: Simons, Chief Judge; Allen and Miller, Circuit Judges.

Per Curiam. Appellants were convicted under a one-count indictment charging a conspiracy to violate the internal revenue laws of the United States with respect to the manufacture, transportation and sale of distilled spirits.

Appellants contend that it was reversible error for the District Judge to decline to give to the jury the following instruction requested in writing by them: "The Court is permitting you to take to the jury room with you the indictment in this case but you are again instructed that the indictment itself is not evidence of the guilt of the accused persons."

The requested instruction embodied a correct principle of criminal law, and might well have been given. **Capriola v. United States,** 61 F. (2d) 5, 7-8, C. A. 7th, cert. denied, 287 U. S. 671; **Little v. United States,** 73 F. (2d) 861, 864, C. A. 10th. Whether it was reversible error for the trial judge to refuse to give, in addition to his general charge, a specific instruction that the indictment is not to be considered as evidence of the guilt of the accused, when so requested by the defendant, is the question presented.

Appellants rely upon **United States v. Schanerman,** 150 F. (2d) 941, C. A. 3rd, in which refusal to give such a charge was held reversible error. The Court said: "When requested so to do, as in the instant case, the district court, in **clear, unmistakable** words, should have charged the jury that the finding of an indictment is no evidence of the guilt of the accused." (Emphasis added.) However, the Court at the same time recognized the rule with respect to instructions generally that it is not reversible error to refuse to give a requested instruction stating a correct proposition of law essential to the proper determination of an issue, if the requested instruction is given in substance or in effect in the general charge of the court to the jury. The court in that case cited and partly relied upon an earlier case in the same circuit, **Gold v. United States,** 102 F. (2d) 350, 352, C. A. 3rd, and two cases from the Eighth Circuit cited by the court in **Gold v. United States,** supra, namely, **Cooper v. United States,** 9 F. (2d) 216, 226, C. A. 8th, and **Nanfito v. United States,** 20 F. (2d) 376, 378, C. A. 8th. The rulings in these cases seem to be based upon the rule applicable to instructions generally that the court's general charge to the jury contained nothing to the same effect as that required by the defendant.

We have no doubt that if the trial judge permits the indictment to be taken to the jury room, a refusal to instruct the jury that the indictment itself is not evidence of the guilt of the defendant is reversible error unless the

instruction is otherwise sufficiently covered in the instructions given. However, we are of the opinion that the weight of authority is that it is not reversible error to refuse to give a requested specific instruction to that effect if the substance of the requested instruction has been sufficiently covered by the instructions given. **Henderson v. United States,** 218 F. (2d) 14, 18, C. A. 6th; **State v. Sauerbry,** 233 Iowa 1076, 10 N. W. (2d) 544, 546; and cases cited therein; **State v. Di Orio,** 136 N. J. L. 205, 51 A. (2d) 97, 98, reversing 134 N. J. L., 48 A. (2d) 276, which specifically relied upon **United States v. Schanerman,** supra; **Watts v. United States,** 212 F. (2d) 275, 277-278, C. A. 10th; **Sconyers v. United States,** 54 F. (2d) 68, C. A. 5th; **Vandiver v. State** (Ala. App. 1954), 73 So. (2d) 566, cert. denied, 73 So. (2d) 572. See: **Robilio v. United States,** 291 F. (2d) 975, 987, C. A. 6th, cert. denied, 263 U. S. 716; **Kelly v. Commonwealth,** 259 Ky. 770, 772.

In the present case, the district judge, in charging the jury, stated, "the indictment in this case, which, as you understand, I am sure, is a means only by which the defendants are brought before this court and this jury for trial, charges the defendants . . . The indictment, which is a rather lengthy one, will be furnished you in the jury room for your convenience." He later referred to the conspiracy, "charged against them in the indictment," and instructed on the necessity of finding beyond a reasonable doubt "after a careful consideration of the evidence in this case" that the defendants participated in the conspiracy "charged against them by the Government." He carefully and correctly explained the meaning of reasonable doubt. He charged upon the presumption of innocence, and specifically stated that it was incumbent upon the Government before the jury could convict the defendants to establish to the jury's satisfaction beyond a reasonable doubt "that the crime charged in the indict-

ment, and every constituent element thereof, has been committed."

Considering the instructions in their entirety, we think the substance of the requested instruction was covered in the general charge and that the jury understood therefrom that the appellants could not be found guilty until the Government established such guilt beyond a reasonable doubt by evidence produced at the trial without consideration of the indictment itself. **Watts v. United States**, supra, 212 F. (2d) 275, C. A. 10th; **Robilio v. United States**, supra, 291 F. 975, 987, C. A. 6th, cert. denied, 263 U. S. 716.

Numerous other questions are presented by the appellants' brief dealing with the admissibility of evidence and motions for a mistrial, which we have considered. The evidence on behalf of the Government was strong and convincing. In our opinion, the rulings complained of did not constitute prejudicial error. Rule 52 (a), Rules of Criminal Procedure.

The judgments are affirmed.

Order Allowing Appellants Additional Time to File for Rehearing.

(Filed May 30, 1957.)

On application for the Appellants, through their attorneys, for an extension of time within which to file a Petition for Rehearing upon the grounds set forth in said written motion, the United States Attorney consenting thereto;

It Is by the Court Ordered:

That the Appellants be allowed an additional thirty days within which to file a Petition for Rehearing in this Court.

Petition for Rehearing.

(Filed June 17, 1957.)

Copy Furnished With Original Transcript.

Order Denying Rehearing.

(Filed June 25, 1957.)

Appellants' petition for rehearing having been considered by the Court,

It Is Ordered that said petition be denied.